

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN NATIONAL INSURANCE COMPANY,

Petitioner;

v.

CITIBANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether banks which tortiously convert checks made payable to fiduciaries or trustees can escape liability under Section 3-420 of the Uniform Commercial Code to the principals or trust beneficiaries who are the innocent victims of such conversions?

CORPORATE DISCLOSURE STATEMENT

American National Insurance Company has no parent corporation. No publicly held company owns 10% or more of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *American National Insurance Company v. Citibank, N.A.*, 543 F.3d 907 (7th Cir. 2008). See App. A. On September 11, 2008, the Seventh Circuit affirmed the August 24, 2007 decision of the United States District Court for the Northern District of Illinois, which is reported at *National Accident Insurance Underwriters, Inc., et al. v. Citibank, F.S.B.*, 533 F. Supp. 2d 784 (N.D. Ill. 2007). See App. B. The Seventh Circuit's order denying petitioner's timely petition for rehearing and rehearing *en banc* on October 30, 2008 is unreported. See App. C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's Opinion was rendered on September 11, 2008. See App. A. The Seventh Circuit's October 30, 2008 denial of petitioner's timely petition for rehearing and rehearing *en banc* is unreported. See App. C.

STATUTORY PROVISIONS INVOLVED

§ 3-420. Conversion of instrument.

- (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a

person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

- (b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
- (c) A representative, other than a depositary bank, that has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

810 ILCS 5/3-420 (West 2008). See App. D.

STATEMENT OF THE CASE

1. *Statement of the Case.*

American National Insurance Company (“ANICO”) seeks review of the Seventh Circuit Opinion that affirmed the District Court’s grant of summary judgment in favor of Citibank, N.A. (“Citibank”), finding ANICO lacked standing to assert a conversion claim against Citibank under Section 3-420 of the Illinois Uniform Commercial Code, 810 ILCS 5/3-420 (“UCC 3-420”) because ANICO was not “a payee, indorsee, or any other entity recognized upon the instruments themselves.” App. A, 8a.

This Petition addresses whether a bank can escape liability to a trust beneficiary or principal, who claims an ownership interest in a check and its underlying funds but is not the payee of the check, when that bank converts such a check in violation of UCC 3-420.

Citibank converted 44 obviously altered checks belonging to ANICO, totaling in excess of \$17 million, by taking them for deposit from a person not entitled to enforce them. The checks at issue were drawn by ANICO’s policyholders and made payable to ANICO’s fiduciary, National Accident Insurance Underwriters (“NAIU”), to pay premiums due to ANICO for insurance coverage provided by ANICO. NAIU was ANICO’s managing general underwriter for an insurance pool in which ANICO was the sole participant pursuant to an agreement between the parties known as the National Accident Insurance Group Underwriting Agreement. ANICO retained NAIU to collect premiums and hold

them in a fiduciary capacity as trustee for ANICO in a separate premium trust account maintained by NAIU, specifically created on behalf of and for the benefit of ANICO. NAIU acted as an intermediary for ANICO and all premiums received by NAIU were "deemed to have been received by" ANICO, thus releasing the policyholders' payment obligation. Rather than depositing the checks into the premium trust account, an NAIU officer blatantly altered the checks by manually typing a slash "/" followed by the words "Sherman" or "SHERMAN" to the payee line or face of the checks. He then gave them to Citibank for deposit into his own bank account in the name of "Sherman Imports, Inc." Citibank took the checks and credited the Sherman Imports, Inc. account for the amount of each check. By doing so, Citibank converted the checks in violation of UCC 3-420.

On May 10, 2002, NAIU filed a Complaint for conversion against Citibank in the United States District Court for the Northern District of Illinois ("District Court"). ANICO intervened in the action and, on October 16, 2003, filed its Complaint against Citibank for conversion under the UCC 3-420. Citibank moved for summary judgment on December 18, 2006, arguing ANICO lacked standing to bring its conversion claims because it was not a payee of the checks. On August 24, 2007, the District Court entered an Order granting Citibank's Motion for Summary Judgment, holding "ANICO's status as a non-payee of the checks at issue precludes its claims for conversion of those checks." The United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed the District Court's decision.

2. District Court Jurisdiction.

The United States District Court for the Northern District of Illinois, Eastern Division, properly exercised jurisdiction under 28 U.S.C. § 1332(a). The jurisdictional amount in controversy exceeded the sum of \$75,000. On October 16, 2003, when ANICO originally filed its Complaint against Citibank, F.S.B., ANICO was a Texas corporation and maintained its principal place of business in Galveston, Texas. Citibank, F.S.B. was a federally chartered savings bank with its principal place of business in California and its home office in Virginia. Plaintiff NAIU was a Delaware corporation with its principal place of business in Illinois. Thereafter, pursuant to the District Court's Order dated December 20, 2007, Citibank, N.A. was substituted for Citibank, F.S.B. Citibank, N.A. is a federally chartered national banking association, whose principal place of business is in New York, and whose main office (as set forth in its articles of association) is in Nevada. Thus, notwithstanding the substitution, at all times, the parties to this lawsuit were of diverse citizenship for purposes of 28 U.S.C. § 1332.

REASONS FOR GRANTING THE PETITION

The Court's supervisory powers are needed to prevent banks from escaping liability, nationwide, to the innocent victims of tortious conversion. Absent the Court's exercise of its supervisory powers to reverse the Seventh Circuit's decision, courthouse doors across the country will be closed to a host of conversion victims who rely on their fiduciaries in the transaction of day-to-day business.

To deal fairly and efficiently with checks, states have adopted the Uniform Commercial Code to encourage efficient decision-making on whether to pay or return checks, while fairly allocating losses resulting from commercial transactions which involve negotiable instruments. In recent decades, Articles 3 and 4 of the Uniform Commercial Code, as adopted by the states, have supplied the basic legal framework for bank deposits and check collections.

While the specific issue before the Seventh Circuit involved the construction of conversion claims under UCC 3-420, 49 states,¹ the District of Columbia, and the Virgin Islands have adopted a substantively identical provision in the Uniform Commercial Codes in their jurisdictions. By limiting standing under UCC 3-420 to "a payee, indorsee, or any other entity recognized upon the instruments,"² the Seventh Circuit eliminates a right of action for an entire category of innocent litigants—trust beneficiaries and principals who ultimately suffer the loss caused by banks' conversion of checks which such parties own, but which are payable to their fiduciaries. The Seventh Circuit's strict interpretation of ownership interests in a check is contrary the express terms of the Uniform Commercial Code and violates the

¹ The New York UCC contains Section 3-419, (McKinney's U.C.C. § 3-419(i)), the predecessor of the conversion provision currently contained in Section 3-420 of the Illinois UCC; however, a bill is currently before the New York legislature to adopt a substantively identical a provision.

² For simplicity, ANICO abbreviates its references to "a payee, indorsee, or any other entity recognized upon the instruments," as "a payee."

drafters' intention that courts look to the terms of ancillary contracts to determine parties' interests in an instrument when it cannot do so from the face of the check. The Seventh Circuit Opinion undermines the very purposes of the Uniform Commercial Code by discouraging, rather promoting, the modernization and continued expansion of business practices through custom, usage and agreement of the parties.

To reach its faulty conclusion, the Seventh Circuit departs from the plain language of UCC 3-420 by adding words to change its meaning. The Seventh Circuit did so to address a hypothetical and misplaced concern that allowing claims like ANICO's would unduly burden banks with the need to investigate each check presented for negotiation, bringing commercial transactions "to a grinding halt." App. A, 6a. This concern confuses *enforcement* of an instrument with its conversion. Contrary to the Seventh Circuit's assumption, while a non-payee may not enforce a check, nothing in UCC 3-420 prohibits a trust beneficiary such as ANICO from suing for a check's conversion.

The Seventh Circuit ultimately concludes this case is about allocating loss to one or another "relatively innocent party." However, a bank which converts a check, like Citibank in this case, is not an innocent party—it is a tortfeasor and the Uniform Commercial Code specifically assigns tort, not contractual, liability to it for conversion. Banks enable fraudulent schemes, such as the one which stole over \$17 million from ANICO in this case, when they take multiple checks and pay the funds to the private bank accounts of unfaithful fiduciaries. If standing to redress this conversion is

limited to payees, converting banks can significantly reduce their liability by settling with such unfaithful fiduciaries, who have no independent pecuniary interest in the checks or their proceeds. The Seventh Circuit promotes settlements among multiple tortfeasors at the expense of their victims—converting banks escape liability and the unfaithful fiduciaries receive a windfall. For all practical purposes, the Seventh Circuit eliminates the sole chance for innocent trust beneficiaries and principals to recoup their losses from the tortfeasors with the financial means to fully compensate them—the banks which converted their checks. Such tortfeasors should not be allowed to escape liability to their victims in the name of preserving the banking system. The Seventh Circuit acknowledged that banks can look beyond the name on the payee line “where due care demands it.” This is such a case where due care demands it.

This issue was one of first impression in Illinois and only one other decision in the United States, *Clients' Security Fund of N.Y. v. Goldome*, 148 Misc.2d 157, 560 N.Y.S.2d 84 (N.Y. Sup. Ct. 1990), addressed a similar issue. The Seventh Circuit rejected the *Goldome* decision, which allowed an equitable owner of a check to assert a claim for conversion against a depositary bank, and instead attempted to support its decision with its earlier conclusions in the holdings in *Kentuckiana Healthcare, Inc. v. Fourth Street Solutions, LLC*, 517 F.3d 446 (7th Cir. 2008), a case that did not involve the issues presented here. The dearth of authority on the issue and the fact it involves a Uniform Commercial Code provision adopted in nearly every state, ensures that the Seventh Circuit Opinion will carry great weight in

courts across the country. Absent this Court's exercise of its supervisory power to reverse the Seventh Circuit Opinion, banks across the nation will escape liability for their tortious conduct.

I. This Court's supervisory powers are needed to prevent banks from escaping liability for the conversion of checks to the real owners of such checks who ultimately suffer the loss caused by the banks' conversion

The Seventh Circuit's decision to deny ANICO standing to sue Citibank for conversion will improperly close the courthouse door to a wide variety of trust beneficiaries who have been victimized by both their fiduciaries and the banks which converted their checks. In effect, the court's ruling says that when an instrument representing a beneficiary's funds is converted by a bank, the beneficiary's right to recover those funds is limited to the whims of an unfaithful fiduciary. Such beneficiaries could be, *inter alia*, an injured client whose settlement check was made payable to his attorney, a ward whose living expense check was made payable to his guardian, or, as here, an insurance company whose premiums were paid in trust to its fiduciary managing general underwriter. The Seventh Circuit lets banks escape liability to the true owner of checks and their proceeds, in favor of payees in name only who have no independent pecuniary interest in the checks converted.

Where, as in this case, a fiduciary is entrusted with the responsibility of collecting funds on behalf of and for the benefit of a trust beneficiary or principal, that

fiduciary acts merely as an intermediary. The fiduciary does not provide the underlying services for which the check represents payment and is not the intended beneficiary of the underlying funds. The checks are intended to satisfy a debt owed to, or provide benefits for, the trust beneficiary or principal. The trust beneficiary or principal is the true owner of the checks and underlying funds, and is the party that ultimately suffers the loss caused by a bank's conversion. The Seventh Circuit Opinion, however, limits a converting bank's liability to the fiduciary, who has no financial stake in the check and no incentive to seek a full recovery from the converting bank, simply because that fiduciary is the named payee.

The injustice to trust beneficiaries and principals is magnified where a converting bank settles a suit under UCC 3-420 with an unfaithful fiduciary for mere pennies on the dollar. The converting bank escapes its liability and the unfaithful fiduciary receives a windfall while the trust beneficiary or principal is left without an adequate remedy. The trust beneficiary or principal could sue its unfaithful fiduciary, but in all likelihood that fiduciary is incarcerated and/or bankrupt. Realistically, the converting bank is likely the only party with the financial ability to fully compensate the trust beneficiary or principal. By insulating banks from liability to trust beneficiaries and principals, and limiting their liability to the unfaithful fiduciary, the Seventh Circuit effectively eliminates the only likely source of recovery for the parties that truly suffer the loss. Instead, the trust beneficiary or principal is betrayed by its unfaithful fiduciary and then further victimized by the converting bank. As in this case, where there were multiple checks

converted, the converting back enables the unfaithful fiduciary to continue its fraudulent scheme by continually taking and obtaining payment on stolen checks and crediting the proceeds to the unfaithful fiduciary's personal bank account. The court then finishes the job by forbidding the victim from recovering for the bank's conversion.

Contrary to the Seventh Circuit's misplaced concern, allowing standing to trust beneficiaries like ANICO under UCC 3-420 will not require such bank "to conduct a full blown investigation every time [it is presented with a check for negotiation] to make sure that a party with an equitable interest in the checks [is] not lurking in the background." App. A., 6a. To the contrary, when a check is negotiated to a depositary bank for cash or for deposit, the bank need only ensure the person negotiating the check is the payee. The bank need only pay the payee; as long as the person giving the check to the bank is the payee, any action the bank takes will not be a conversion. The bank's only obligation at the point of negotiation is to validate the identity of the person purporting to be the named payee.

On the other hand, if the bank does not validate the purported payee's identification, and the bank pays the funds to someone other than the payee, the bank converts the check. Nothing in UCC 3-420 limits the bank's liability in that situation to a payee only. The Seventh Circuit recognized that banks can be asked to look beyond the name on the payee line "where due care demands it." This is such a case where due care demands it. The party to whom a bank is liable is the party that ultimately suffers the loss caused by the

banks' conversion. When, as here, the payee is an unfaithful fiduciary and the party ultimately suffering the loss is a trust beneficiary or principal, the bank's liability is to the trust beneficiary or principal, not the fiduciary who is the payee in name only.

The Seventh Circuit confuses conversion of instruments with enforcement of instruments. This is a case about who has standing to sue in conversion to recover the underlying funds *after* the bank has already tortiously converted the checks. Thus, the Seventh Circuit's concern that allowing trust beneficiaries and principals standing under UCC 3-420 would "bring commercial transactions to a grinding halt" is completely unfounded. Even assuming *arguendo* that a bank's interest in smoothly running its operations trumps the interest of an innocent victim of that bank's conversion in obtaining redress from all tortfeasors, banks only need to be concerned about the interests of a trust beneficiary or principal if a bank has *already* converted the check. The hypothetical detriment to the banking system warned of by the Seventh Circuit simply would not come to pass by allowing ANICO its day in court. In fact, in this case no such investigation was even necessary *at all*; Citibank *already knew* of ANICO's interest in the checks because ANICO promptly intervened, filed its conversion claim and asserted its rights as the true owner of the checks and proceeds.

This Court's supervisory powers are needed to prevent banks, such as Citibank, from escaping liability to trust beneficiaries and principals, like ANICO, who are known to be the true owners of converted checks, and who are the parties ultimately suffering the loss caused by the banks' conversion.

II. This Court's supervisory powers are needed to prevent a misinterpretation of UCC 3-420 which will undermine the very purposes of the Uniform Commercial Code nationwide

By limiting standing under UCC 3-420 to payees, the Seventh Circuit departs from the plain language of the statute in favor of an interpretation which requires it to add words which change its meaning. The Seventh Circuit's interpretation of UCC 3-420 is also contrary to the express purposes of the Uniform Commercial Code. UCC 3-420 has been adopted nationwide; the impact of the Seventh Circuit's flawed analysis will be felt nationwide as well.

In analyzing who has standing to sue for conversion under the UCC 3-420, the Seventh Circuit correctly acknowledges that a plaintiff must prove "an ownership of, interest in, or right to possession of the check."³ App. A, 4a. To limit standing to payees, the Seventh Circuit adds language to the statute to alter its plain meaning. The clear, unambiguous, and express language of UCC 3-420 specifies only who *may not* sue for conversion of an instrument, but does not otherwise

³ In order to establish that a financial institution is liable for conversion of a negotiable instrument, a plaintiff must establish: (1) an ownership of, interest in or right to possession of the check; (2) the endorsement of the check was forged or unauthorized; and (3) the defendant bank was not authorized to cash the check. *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 439 (7th Cir. 2005).

limit who may bring such a claim. UCC 3-420 provides, in pertinent part:

- (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or co-payee.

810 ILCS 5/3-420. The Seventh Circuit ignores this language in favor of a hypothetical version of the statute that states that an action for conversion may only be brought by “a payee, indorsee, or any other entity recognized on the instruments themselves.” App. A, 8a.

In doing so, the Seventh Circuit makes a distinction between the owner of a check and the owner of the underlying funds. The Seventh Circuit’s strained interpretation creates an arbitrary distinction that is not recognized by the language of UCC 3-420. Numerous other provisions throughout the Uniform Commercial Code and within the drafters’ Official Comments also make clear that the Seventh Circuit’s construction was

never intended. A party's interest in and ownership rights to instruments may be determined by principles of the law of property, independent from the provisions of involving enforcement of checks under Article 3. Official Comment 1, 810 ILCS 5/2-203 (litigants may establish their "ownership rights in instruments by means of all principles of the law of property, independent of Article 3"); see also *Ocwen Federal Bank v. Harris*, No. 99-658C, 2000 WL 1644377, at *3 (N.D. Ill. Oct. 24, 2000). Litigants may use ancillary contracts between the parties to prove their interest in converted checks where, as here, it may not be evident from the face of the checks. Official Comment 2, 810 ILCS 5/420(b); see also *Hoffman v. First Nat. Bank of Chicago*, 299 Ill.App. 290, 20 N.E.2d 121 (1st Dist. 1939). The Official Comments explain how the court's review of ancillary contracts is necessary to avoid windfalls to payees who have "no interest or a limited interest in the proceeds of the check." Official Comment 2, 810 ILCS 5/420(b). Such is a clear indication that the drafters of the Uniform Commercial Code not only contemplated that courts would look beyond the face of the checks, but arguably require courts to look beyond the face of the check, when necessary, to ensure that payees who have no interest in the check proceeds do not receive windfalls.

The Official Comments to Section 3-110 also demonstrate that the owner of the check is not limited to the "a payee, indorsee, or any other entity recognized on the instruments themselves." Official Comments, 810 ILCS 5/3-110. Section 3-110 determines to whom an instrument is payable. Section 3-110(c)(2)(i) speaks specifically to the instances where an instrument is payable to a trust or estate and provides that it is only

payable to the trustee or representative as payee.⁴ The trustee must sign the instrument to negotiate it and is the only party who can be paid. However, Official Comment 3 explains that, “[t]his provision merely determines who can deal with an instrument as a holder. *It does not determine ownership of the instrument or its proceeds.*” 810 ILCS 5/3-117, Official Comment 3 (emphasis added). Thus, the owner of the instrument or its proceeds clearly may be someone other than the party whose name appears on the payee line. This distinction between owner and payee in the fiduciary situation is especially significant when the fiduciary is not acting in the interest of the beneficiary. To say that when an instrument representing the beneficiary’s funds is converted, the beneficiary’s right to recover those funds is confined to the whims of the unfaithful fiduciary is preposterous.

The Seventh Circuit’s strict interpretation of UCC 3-420 also undermines the express purposes and rules of construction of Uniform Commercial Code. The Uniform Commercial Code states it shall be *liberally* construed to promote modernization of commercial transactions, continued expansion of commercial practices, and uniformity among the jurisdictions. Specifically, the UCC states, in pertinent part:

**1-102. Purposes, Rules of Construction,
Variation by Agreement.**

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

⁴ 810 ILCS 5/3-110(c)(2)(i).

(2) Underlying purposes and policies of this Act are

- a. to simplify, clarify and modernize the law governing commercial transactions;
- b. permit continued expansion of commercial practices through custom, usage and agreement of the parties;
- c. to make uniform the law among the various jurisdictions.

810 ILCS 5/1-102 (West 2008).

The Official Comments to this Section explain that Sections (1) and (2) are intended to provide flexibility to accommodate the expansion of business practices. The Official Comments explain:

This Act is drawn to provide flexibility so that, since it is intended to be a semi-permanent piece of legislation, it will provide its own machinery for expansion of commercial practices. It is intended to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices. However, the proper construction of the Act requires that its interpretation and application be limited to its reason.

810 ILCS 5/1-102, Official Comment 1.

The Seventh Circuit's strained construction of ownership interests in instruments under UCC 3-420 hinders the very flexibility the drafters of the Uniform Commercial Code intended courts to embrace. The Seventh Circuit Opinion unjustifiably forfeits rights of parties, like ANICO, the true owners of the checks and underlying proceeds, who ultimately suffer the loss caused by a bank's conversion, and leaves them without an adequate remedy. Consequently, the Seventh Circuit Opinion will effectively dictate the mechanism by which parties, like ANICO, manage their business. Trust beneficiaries and principals will have to choose between utilizing the services of fiduciaries to manage their business or risk exposure to loss in the event a bank converts its checks. Such a result clearly contradicts the very purpose of the Uniform Commercial Code; it discourages, rather than promotes, the modernization and continued expansion of commercial practices through custom, usage and agreement of the parties. The Seventh Circuit's ruling takes a step backwards in the world of commercial transactions involving trust relationships.

This issue was one of first impression in Illinois and only one other decision in the United States, *Clients' Security Fund of N.Y. v. Goldome*, 148 Misc.2d 157, 560 N.Y.S.2d 84 (N.Y. Sup. Ct. 1990), addressed a set of circumstances. In *Goldome*, the court allowed an equitable owner of a check to assert a claim for conversion against a depositary bank. The court addressed the conversion claims of a client and his assignee, who sued the bank which accepted for deposit a check made payable to one of his attorneys, which check had been stolen and fraudulently endorsed. The

court rejected the bank's claim that plaintiffs lacked standing under the Uniform Commercial Code to bring conversion claims, holding "to state a cause of action for conversion, a plaintiff need only allege either an ownership interest or a right of possession in any specifically identifiable funds." *Goldome*, 148 Misc.2d at 159. The check was payable to and delivered to the client's attorney *to be held by the attorney in his fiduciary capacity on behalf of the client*. Accordingly, the court concluded "[t]he mere fact that [the client] was not named as payee on the check is of no consequence since the "rightful owner" of a check, although not named as payee, has standing to sue." *Id.* The reasoning of the *Goldome* decision is directly applicable to the case at bar. As the true owners of the checks, and as the parties who ultimately suffer the loss from a bank's conversion, trust beneficiaries and principals, like ANICO, have standing to sue the converting bank.

The Seventh Circuit rejects the *Goldome* decision and instead misapplies and overstates the holdings in *Kentuckiana Healthcare, Inc. v. Fourth Street Solutions, LLC*, 517 F.3d 446 (7th Cir. 2008), a case that is factually and legally distinguishable from the case at bar. In *Kentuckiana*, the court rejected plaintiff's conversion claims under Indiana law, IC § 32-34-1-26, after finding that plaintiff sought recovery of a debt owed to it by a third-party (SCNW) under contract, not "property" over which defendants, without authority, exercised control. The court noted "[i]f you simply owe someone money and fail to pay it, you have broken a contract but you have not taken your creditor's property." *Id.* at 447. The court also found that

defendants, SCNW's creditors, had no duty to plaintiff as “[t]here is nothing in either [of defendants'] contract[s] to suggest that SCNW had ceded control over its finances to any of the defendants, whether jointly or severally.” Indeed, if defendants had paid to plaintiff amounts collected by SCNW they would have “violated their contract[s] with SCNW.” *Id.* at 448. Unlike the plaintiff in *Kentuckiana*, ANICO was not suing its (or its fiduciary's) creditors; Citibank converted the checks under UCC 3-420 and the checks and their proceeds represent property, not a debt. In this case, the payee of the checks was strictly acting as ANICO's intermediary and fiduciary for purposes of collecting and holding the funds in a premium trust account on behalf of ANICO.

This Court's guidance is much needed. The Seventh Circuit's misinterpretation of a provision of the Uniform Commercial Code adopted in nearly every state and U.S. territory will have a disproportionate impact given the dearth of published authority on this issue. The Court's intervention will serve the national interest in ensuring the provisions of the Uniform Commercial Code are fairly and accurately being applied in states across the country to promote a just and efficient banking system.

III. This Court's supervisory powers are needed to protect injured parties' rights to sue the banks that convert their checks and cause their losses

In addition to misconstruing the express, clear, and unambiguous language of UCC 3-420, the Seventh Circuit Opinion disregards longstanding and fundamental principles of tortfeasor liability. The Seventh Circuit bolsters its position by declaring, without support, that Citibank was a “relatively innocent party.” Conversion is a tort and banks, like Citibank, that convert checks are tortfeasors. The common law of conversion of property is incorporated into the UCC 3-420.⁵ Sound common law principles of tortfeasor liability hold tortfeasors, such as converting banks, liable to the parties who suffer injury as a result of their tortious conduct.

The Seventh Circuit’s aside about Citibank’s perceived relative innocence betrays the fundamental principle that tortfeasors are liable to their victims jointly and severally for losses caused by their tortious conduct, regardless of whether another tortfeasor has caused the same injury. RESTATEMENT (SECOND) OF TORTS § 875 (1979) (“Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm”); *see also Richman v. Sheahan*, 512 F.3d 876, 884 (7th Cir. 2008) (Multiple

⁵ UCC 3-420 expressly provides that “[t]he law applicable to conversion of personal property applies to instruments.” 810 ILCS 5/3-420(a).

tortfeasors held jointly and severally liable to victim when each tortfeasor's conduct could have inflicted the entire injury upon victim). By denying ANICO standing to sue Citibank for conversion, the Seventh Circuit prevented ANICO from presenting evidence to challenge the court's unfounded pronouncement of Citibank's "relative" innocence. More importantly, however, UCC 3-420 defines Citibank's actions as conversion and therefore Citibank is a tortfeasor. Victims are entitled to assert an action against any tortfeasor who caused their injury. Similarly, in the context of trust relationships, beneficiaries may assert their own actions to recover trust assets where a trustee/representative fails to adequately protect their interests. *West Penn Admin. Inc. v. Union Nat'l Bank of Pittsburgh*, 233 Pa. Super. 311, 327, 335 A.2d 725, 732 (Pa. Super. 1975); *Maher v. First Nat'l Bank*, 93 Ill. App. 404, at *1 (1st Dist. 1900). While the Seventh Circuit recognizes that ANICO was likely the ultimate beneficiary of the funds underlying the checks converted by Citibank, it fails to hold Citibank accountable to ANICO for its injuries caused by Citibank's blatantly tortious conversion. This conclusion represents a dramatic departure from basic tort principles which will be felt across the country. The Seventh Circuit's misplaced concern for the operation of the banking system does not justify its denial of a victim's day in court.

This Court's review is necessary to ensure parties, like ANICO, can recover losses from banks that caused their injury by tortiously converting checks.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT DECIDED SEPTEMBER 11, 2008**

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 07-3746

AMERICAN NATIONAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

CITIBANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 02 C 3390—**Joan B. Gotschall, Judge.**

ARGUED APRIL 16, 2008—DECIDED SEPTEMBER 11, 2008

Before EASTERBROOK, *Chief Judge*, and WOOD and WILLIAMS, *Circuit Judges*.

WOOD, *Circuit Judge*. Many rules of commercial law allocate risk among different parties to transactions. Sometimes, however, it is impossible to impose responsibility for losses on the party that caused them.

Appendix A

People disappear with ill-gotten gains, or they spend someone else's money on fleeting pleasures. At that point, all that can be done is to allocate loss to one or another relatively innocent party. This is such a case: the real wrongdoer, Robert Carter, will never be able to restore the money he embezzled from his employer, National Accident Insurance Underwriters ("Underwriters"). So we must decide whether Underwriters' assignee, American National Insurance Company ("ANICO") must bear the loss that remains, or if the bank that cashed checks that Carter had altered to make payable to himself is responsible.

ANICO had engaged Underwriters to act as an agent for managing an insurance pool known as "NAIG," for National Accident Insurance Group Underwriting Agreement. One of the duties Underwriters assumed was to receive premium payments for the insurance pool, in the form of checks payable either to Underwriters or NAIG; it also had the job of managing the premium trust account into which the premiums were deposited. In 2002, Underwriters discovered that one of its vice presidents, Robert Carter, had been intercepting premium checks, altering the payee line to make them payable to himself or his company "Sherman Imports," and depositing them in a Citibank account over which he had control. Citibank accepted 44 altered checks, from five different drawers, for a total face value of \$15,813,964.84.

Underwriters filed suit against Citibank for conversion of the checks under 810 ILCS 5/3-420, the

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Illinois version of Uniform Commercial Code § 3-420, which provides the rule for dealing with the conversion of negotiable instruments. Citibank then filed a third-party complaint against Carter and other people involved with his scheme. ANICO moved to intervene in 2003, eventually filing a complaint against Citibank also based on § 3-420. Carter pleaded guilty to criminal charges of mail and tax fraud in 2004; as part of his plea, he forfeited \$5.2 million in property to Underwriters. At that point, Underwriters assigned its interests in this property to ANICO. In 2006, Underwriters and Citibank settled, and all claims arising from that suit were dismissed with prejudice.

This left the litigation between ANICO and Citibank unresolved. In August 2007, the district court granted Citibank's motion for summary judgment against ANICO on all of its claims. Citibank still had unresolved claims pending against Carter and others, and so ANICO asked the district court to direct entry of a partial final judgment on its suit against Citibank, on the ground that there was no just reason to delay resolution. See FED.R.CIV.P. 54(b). The court did so, and the appeal is now before us. We review the court's decision to grant summary judgment *de novo*. *APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624, 628 (7th Cir.2002).

We begin with the language of UCC § 3-420, as adopted by Illinois:

- (a) The law applicable to conversion of personal property applies to instruments.

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An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depositary bank, that has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

810 ILCS 5/3-420. In order to establish that a financial institution is liable for conversion of a negotiable instrument in Illinois, a plaintiff must prove (1) her ownership of, interest in or right to possession of the check; (2) the fact that her apparent endorsement of

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the check was forged or unauthorized; and (3) the fact that the defendant bank was not authorized to cash the check. *Continental Casualty Co. v. American National Bank and Trust Co. of Chicago*, 329 Ill.App.3d 686, 263 Ill.Dec. 592, 768 N.E.2d 352, 361 (Ill.App.Ct.2002); see also *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 439 (7th Cir.2005) (describing Illinois law). Our case turns on the first of these three elements: whether ANICO had any property interest in the checks. If not, then ANICO may not bring a suit for conversion. (Otherwise, the final clause of § 3-420(b) would make little sense, as it limits recovery to “the amount of the plaintiff’s interest in the instrument.” See, e.g., *Edwards v. Allied Home Mortgage Capital Corp.*, 962 So.2d 194 (Ala.2007) (construing Alabama’s version of § 3-420).)

ANICO asserts that it is the “true owner” of the checks, and thus that it has enough of an ownership interest to permit it to pursue this suit. Underwriters managed and administered the premium trust account. The checks were made out to Underwriters or NAIG; ANICO admits that the checks were never made out to it, nor was it ever an indorsee. ANICO had no signatory or drawing rights on the account and could not touch the funds. Instead, Underwriters wrote a check to ANICO each month based on the fees it had collected and deposited into the account. ANICO argues nevertheless that it is the “true owner” of the checks, relying on some kind of quasi-trust theory. Underwriters, it reasons, acted as ANICO’s agent, and ultimately all of the funds in the premium trust account

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(minus Underwriters' fees) belonged to ANICO; Underwriters simply administered the premium trust account for ANICO's benefit. Thus, ANICO contends, it has at least an equitable interest in the checks, no matter what the "Pay To the Order Of" line might have said.

This novel interpretation of the familiar drawer-drawee-indorsee-payee relationship is unprecedented, and for good reason: it betrays the fundamental axiom of negotiable instruments that banks must pay the payee. ANICO cites a case from a trial-level court in New York to support its argument that this rule has its exceptions, but we do not find it persuasive. See *Clients' Security Fund of N.Y. v. Goldome*, 148 Misc.2d 157, 560 N.Y.S.2d 84 (N.Y. Sup. Ct. 1990). ANICO seems oblivious to the burden that its theory would put on every bank that was presented with a check for negotiation. Instead of being able to look at the payee line and to verify that the person presenting the check was indeed entitled to do so, banks in ANICO's world would need to conduct a full-blown investigation every time to make sure that *910 a party with an equitable interest in the check was not lurking in the background. Such a system would bring commercial transactions to a grinding halt.

The payee on the 44 checks at issue here, before Carter unlawfully altered them, was Underwriters or NAIG, never ANICO. Not surprisingly, Underwriters sued Citibank and secured a settlement; it also assigned the \$5.2 million that was recovered from Carter to ANICO.

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ANICO appears to be confusing an interest in the funds backing the checks with an interest in the checks themselves. Perhaps it is the ultimate beneficiary of the funds. Once Underwriters received the checks, it owed ANICO most of the money, according to the terms of a separate contract. The terms of this debt, however, are tied to this ancillary contract, not the negotiable instruments in question. We considered a similar situation in *Kentuckiana Healthcare, Inc. v. Fourth Street Solutions, LLC*, 517 F.3d 446 (7th Cir.2008), where we held that a party to whom a debt was owed was not entitled to sue for conversion. See *id.* at 447.

Illinois courts do not recognize an action for conversion of intangible rights. *Janes v. First Federal Savings & Loan Ass'n.*, 11 Ill.App.3d 631, 297 N.E.2d 255, 260 (Ill.App.Ct.1973). The rights involved with commercial paper merge into the document, a tangible thing, and thus conversion of the document is possible. *Hayes v. Massachusetts Mutual Life Ins. Co.*, 125 Ill. 626, 18 N.E. 322, 325 (Ill.1888). The rights associated with Underwriters' separate contract with ANICO, on the other hand, are intangible and do not merge into the negotiable instruments. Unless ANICO can show a possessory interest in the checks, it cannot sue for conversion, because its only interest is a derivative claim to the funds, not a claim to the instruments themselves.

The payee does have a property interest in checks made out to her, as does the indorsee. ANICO is neither and has not succeeded in showing how the "true owner" entity it posits fits into the real world of payees, drawers,

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drawees, and indorsees. These roles carry specific and well established meanings: for the reasons we have already mentioned, banks cannot be asked to go beyond the name on the payee line except where due care demands it. If banks were required to look behind the names on the check itself and delve into the contractual relationships of named payees and other, unnamed entities, writing checks would become an impossibility. It is precisely in order to maintain a workable financial system that the UCC does not resort to generalities like the "true owner" and instead insists on terms of art like "payee."

To summarize, ANICO has no property interest in the checks at issue here: it is not a payee, indorsee, or any other entity recognized upon the instruments themselves. To the extent that it has any relevant property interest, it is in the funds backing the checks, and its interest in those funds is determined by a separate contract. That contract is not merged into the checks, however, and therefore at most gives rise to an intangible right. While Illinois permits suits for conversion of negotiable instruments by those with a possessory interest, it does not recognize causes of action on intangible rights.

Underwriters does have a clear property interest: it is the named payee. Banks must pay the payee, and if there is a question in a particular case about that obligation, the payee may sue. Underwriters did and reached a settlement. If ANICO has any dispute, it is with Underwriters, under the terms of the agreements

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that govern their relationship. ANICO has no dispute with Citibank, and so the district court's grant of summary judgment against ANICO and in favor of Citibank is Affirmed.

**APPENDIX B—ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION
FILED AUGUST 24, 2007**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Case No. 02 C 3390

Judge Joan B. Gottschall

**NATIONAL ACCIDENT INSURANCE
UNDERWRITERS, INC.,**

Plaintiff/Counterclaim-Defendant,

and

American National Insurance Company,

Intervenor-Plaintiff/Counterclaim-
Defendant,

v.

CITIBANK, F.S.B.,

Defendant/Counterclaim-Plaintiff/
Third-Party Plaintiff.

*Appendix B***ORDER**

Plaintiff-intervenor American National Insurance Company (“ANICO”) sued Citibank, F.S.B. (“Citibank”) under the Illinois Uniform Commercial Code, 810 ILCS § 5/3-420 (1992) (“UCC 3-420”) for conversion of forty-four checks made payable to National Accident Insurance Underwriters, Inc. (“NAIU”) but which were intercepted and altered by NAIU employee Robert Carter. Citibank has moved for summary judgment. For the reasons stated below, Citibank’s motion for summary judgment is granted.

I. BACKGROUND

NAIU is engaged in the business of insurance underwriting, marketing, and claims processing. In May 2002, NAIU sued Citibank for conversion under UCC 3-420. The complaint alleged that Robert Carter (“Carter”), an NAIU employee, had engaged in a scheme to intercept and convert to his own use over \$10 million of premium checks payable to NAIU. Carter allegedly added the payee “Sherman” to the checks. Carter indorsed the altered checks and deposited them in a Citibank account he opened years earlier on behalf of Sherman Imports, Inc. Citibank accepted the altered checks, credited Carter’s account, and presented the checks to various drawee banks for payment.¹

1. Carter pled guilty to one count of mail fraud and one count of tax fraud in connection with these checks.

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ANICO is in the business of insuring group accident, blanket accident and individual accident insurance. On October 10, 2003, ANICO was granted leave to intervene in the litigation based on ANICO's assertion that it had an ownership interest in the checks. NAIU and Citibank subsequently settled their dispute² and ANICO filed a forty-five count complaint against Citibank which asserted, pursuant to 810 ILCS § 5/3-420, a separate conversion claim for each of forty-five checks, at least some of which were named in NAIU's complaint.³

It is undisputed that ANICO is neither a payee nor indorsee on any of the checks named in its complaint. The checks were made payable to "NAIG," "National Accident Insurance," "National Accident Insurance Gr.," "National Accident Insurance Group," and "N A I U."

ANICO asserts that it is the "true owner" of the checks based on the following undisputed facts. In September of 1998, ANICO and NAIU entered into a pooling agreement—the National Accident Insurance Group Underwriting Agreement ("NAIG III Agreement" or the "Agreement")—which provided that ANICO was the sole participant in an insurance pool known as the National Accident Insurance Group ("NAIG"). In the Agreement, ANICO is referred to as

2. See Order of Dismissal, March 17, 2006.

3. On November 10, 2006, ANICO moved to voluntarily dismiss Count XXVI, for Check No. 2141.

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"Participant" and NAIU is the "Manager." The stated purpose of the Agreement was to authorize NAIU, on behalf of and under the name NAIG, to transact the kinds of insurance described in the Agreement. Citibank's Statement of Facts Ex. 5.

NAIU collected premiums for the insurance policies it issued, marketed, and sold in the NAIG pool pursuant to the NAIG III Agreement. Upon receipt of the premium checks, NAIU was required to deposit the premiums into a separate Premium Trust Account established for the NAIG.⁴

It is undisputed that ANICO was not a signatory on the Premium Trust Account. There is no evidence that ANICO had the authority to withdraw funds from the Premium Trust Account while NAIU served as Manager of the NAIG pool. Each month, NAIU wrote a single check to ANICO for fees and taxes from the funds collected by NAIU.

Citibank has moved for summary judgment on the grounds that (1) ANICO does not have standing to bring a conversion suit for the checks at issue because it is not a payee of the checks; (2) ANICO does not have standing to bring a conversion suit because the checks were never "delivered" to ANICO; and (3) several of

4. The Agreement does not state that all checks collected by NAIU should be made payable to the order of, or endorsed over to, ANICO. ANICO did not direct NAIU to instruct the drawers of any premium checks to make those checks payable to the order of ANICO.

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ANICO's claims are time-barred. Because the court agrees that ANICO's status as a non-payee of the checks precludes its claim for conversion of those checks, Citibank's motion is granted and the court does not reach Citibank's other two grounds for judgment.

II. DISCUSSION

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The operative facts here are not in dispute. Rather, ANICO and Citibank disagree over the legal effect of UCC 3-420 on those facts, which is appropriately resolved on a motion for summary judgment.

ANICO's claim is that Citibank converted the forty-four checks at issue in violation of UCC 3-420.⁵ UCC 3-

5. The common law action for the conversion of checks was previously governed by UCC § 3-419, Ill.Rev.Stat. ch. 26, § 3-419, which "was intended to be a codification of prior Illinois common law." *Burks Drywall, Inc. v. Washington Bank and Trust Co.*, 110 Ill.App.3d 569, 66 Ill.Dec. 222, 442 N.E.2d 648, 652 (1982). Under former Article 3, courts were divided on the issue of whether the drawer of a check with a forged indorsement could assert rights against a depositary bank that took the check. 810 ILCS 5/3-420(a) (1992) cmt. 1. The last
(Cont'd)

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420 provides that “[t]he law applicable to conversion of personal property applies to instruments” and that “[a]n instrument is . . . converted if it is taken by transfer, other than negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.” 810 ILCS 5/3-420(a) (1992). “To establish that a financial institution is liable for conversion under Illinois law, the plaintiff must establish (1) that she owned, held an interest in, or had the right to possess a negotiable instrument; (2) that someone forged or without authority placed the plaintiff’s endorsement on the instrument; and (3) that the defendant financial institution negotiated the check without her authorization.” *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 439 (7th Cir.2005); see also *Continental Cas. Co. v. American Nat'l Bank & Trust Co. of Chicago*, 329 Ill.App.3d 686, 263 Ill.Dec. 592, 768 N.E.2d 352, 361 (2002); *Burks Drywall, Inc. v. Washington Bank & Trust Co.*, 110 Ill.App.3d 569, 66 Ill.Dec. 222, 442 N.E.2d 648, 652 (1982).

(Cont'd)

sentence of UCC 3-420(a) resolved the conflict by precluding the drawer of a check from bringing a claim of conversion; a drawer’s claim would be against the payor bank for recredit of the drawer’s account for unauthorized payment of the check. *Id.* The new version also precludes a payee who never receives delivery of the check from bringing a claim against the depositary bank; until delivery, the payee does not have any interest in the check. See *id.*

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It is well established under Illinois common law that “[t]he subject of conversion must be an identifiable object of property.” *Cumis Ins. Soc., Inc. v. Peters*, 983 F.Supp. 787, 793 (N.D.Ill.1997) (citing *In re Thebus*, 108 Ill.2d 255, 91 Ill.Dec. 623, 483 N.E.2d 1258, 1260 (1985)). Money may be the subject of conversion but only if the sum of money is capable of being described as a specific chattel. *Sandy Creek Condo. Ass'n v. Stolt and Egner, Inc.*, 267 Ill.App.3d 291, 204 Ill.Dec. 709, 642 N.E.2d 171, 174 (1994) (citing *In re Thebus*, 91 Ill.Dec. 623, 483 N.E.2d at 1260). However, an action for conversion will not lie for money represented by a general debt or obligation. *In re Thebus*, 91 Ill.Dec. 623, 483 N.E.2d at 1261; see also *Great Lakes Higher Educ. Corp. v. Austin Bank of Chicago*, 837 F.Supp. 892, 897 (N.D.Ill.1993) (“Illinois courts do not recognize an action for conversion of intangible rights.”).

Illinois common law recognizes negotiable instruments such as checks to be identifiable objects of property. See *Great Lakes Higher Educ. Corp.*, 837 F.Supp. at 897 (“Illinois courts do recognize a cause of action for conversion of commercial paper, such as a check, on the theory that the intangible right is merged into the specific document.”); *In re Oxford Marketing, Ltd.*, 444 F.Supp. 399, 404 (N.D.Ill.1978) (same).

However, only a person with rights to the negotiable instrument, i.e. the check, may bring a claim for conversion of it. See *Great Lakes Higher Educ. Corp.*, 837 F.Supp. at 897 (The payee of a check is the only one with the requisite possessory interest in the check to

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bring a claim for its conversion.); compare *P.M.F. Services, Inc. v. Grady*, 681 F.Supp. 549, 558 (N.D.Ill.1988) (dismissing plaintiff P.M.F.'s claim for conversion of checks when P.M.F. failed to allege it was either the owner or payee of the checks or that P.M.F.'s endorsement was forged).

Importantly, a person with rights to a negotiable instrument is distinct from a person who may have rights to the funds backed by the check. See *Great Lakes Higher Educ. Corp.*, 837 F.Supp. at 897 (no action for the conversion of intangible rights such as money but only for the conversion of a specific check or draft); *Newport Steel Corp. v. Thompson*, 757 F.Supp. 1152, 1156 (D.Colo.1990) (no claim for conversion may lie for plaintiff who may have been owed the money that the check backed but who was not payee of the check); see *In re Oxford Marketing, Ltd.*, 444 F.Supp. at 404-05 (trustee who did not allege that he ever had title to or possession of a negotiable instrument may lack standing under UCC § 3-419 or under common law principles); see also *Ohio Cas. Ins. Co. v. Bank One*, No. 95 C 6613, 1996 WL 507292, at *11 (N.D.Ill., Sept. 5, 1996) (noting that under § 3-420 of the revised UCC, a plaintiff must have title to or possession of the checks to bring an action for conversion of an instrument); *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83 (Mo.Ct.App.1976) (only the holder or payee of a negotiable instrument may properly sue for conversion under § 3-419).

Here, it is undisputed that ANICO was neither the payee nor the indorsee of the checks at issue. There is

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no evidence that ANICO's endorsement was forged on the checks. Indeed, there is no evidence that ANICO even had the authority to withdraw funds from the Premium Trust Account, into which the checks were meant to be deposited, while NAIU served as Manager of the NAIG pool. Therefore, ANICO does not have the requisite possessory interest in the checks at issue to bring a claim of conversion against Citibank, the depositary bank.

ANICO argues that it is the "true owner" of the checks and therefore has standing to sue Citibank notwithstanding the undisputed fact that it is not the payee of the checks. Pl.'s Opp. 5. ANICO asserts that the checks were intended to pay for insurance provided by or assumed by ANICO, and that NAIU was merely an intermediary that collected the premiums and held them in a fiduciary capacity as trustee on behalf of ANICO.⁶ ANICO's Opp. 11. Even if this were true,

6. ANICO points to the following provision of the NAIG III Agreement:

All premiums received by the Manager, reinsurance recoveries from Outside Reinsurance, and any other monies received by the Manager and due the Participant(s) shall be held by the Manager in a fiduciary capacity as trustee for the Participant(s). Such funds shall be held in a separate premium trust account (the "Premium Trust Account") established in the name of the NAIG with the Manager named as trustee of the account at a bank which is the member of the Federal Reserve System and which

(Cont'd)

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ANICO is not entitled to relief under UCC 3-420 because all ANICO's facts prove is that ANICO has a right to possession of the *funds* that the checks represented.⁷ See ANICO's Opp. 10 ("In determining who had an ownership interest in the Checks, this Court must ascertain who owned the premiums for which the Checks represented payments."). This is not a sufficient possessory interest to bring a cause of action under UCC § 3-420 or Illinois common law for the conversion of

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has assets at the time of deposit of at least \$250 million or at another bank on consent of the Advisory Committee, segregated from all other funds held by the Manager, until such funds are delivered to the Participant(s) or otherwise utilized in accordance with this Agreement.

Citibank's Statement of Facts Ex. 5. This provision, however, does not refer to the checks at issue; rather it refers to the premiums and funds collected by NAIU.

7. Even this argument falls short given ANICO's admission that some of the checks contain amounts for payment of premiums on Royal Sunalliance policies, business that was not part of the insurance pool in which ANICO was a participant. ANICO's Resp. Citibank's Statement of Facts 75. ANICO argues that this goes to the issue of damages rather than standing, see ANICO Opp. 15, n. 16, but the undisputed fact that ANICO is not even entitled to all of the funds backed by the checks proves that ANICO is not seeking a "specific chattel" or specifically identifiable funds. See *Sutherland v. O'Malley*, 882 F.2d 1196, 1200 (7th Cir.1989) ("Where the plaintiff's right is merely to an indeterminate sum of money, a conversion action cannot successfully be maintained.").

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checks. See *Great Lakes Higher Educ. Corp.*, 837 F.Supp. at 897 (A party pleading an action in conversion under either common law principles or UCC § 3-419 must allege that it had title to or possession of the check.); *Ohio Cas. Ins. Co.*, 1996 WL 507292, at *11 ("[W]hile money may be the subject of a conversion action, the plaintiff must be able to describe it as a specific chattel."); *P.M.F. Services, Inc.*, 681 F.Supp. at 558 (plaintiff's possession of the converted property has always been regarded as an essential element of a conversion claim (citing *First Nat'l Bank of Chicago v. Pease*, 168 Ill. 40, 48 N.E. 160 (1897))).

ANICO also argues that UCC 3-420 does not require a plaintiff to be a payee of the checks in order to have standing, asserting that the statute is silent as to who may assert a claim for conversion. ANICO's Opp. 4. The court declines to adopt this interpretation, noting that no other court interpreting Illinois law has done so.⁸ Furthermore, ANICO's suggested interpretation of

8. ANICO relies heavily on *Clients' Sec. Fund of State of N.Y. v. Goldome*, 148 Misc.2d 157, 560 N.Y.S.2d 84 (N.Y.Sup.Ct.1990). In *Goldome*, plaintiff's assignee sued the depositary bank for conversion of a check made payable to plaintiff's attorney for proceeds from the sale of plaintiff's house. The attorney kept the money and the court held that the fact that the plaintiff was not named as payee on the check was of no consequence since he was the "rightful owner" of the check. *Id.* To the extent this case stands for the proposition that non-payees have standing to sue depositary banks under Section 3-420, the court declines to follow it in light of the overwhelming authority that contradicts its holding, and notes that no other court has followed it.

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the statute disregards the provision that states: "The law applicable to conversion of personal property applies to instruments." *See UCC 3-420.* The law applicable to conversion of instruments in Illinois plainly provides relief for a plaintiff who owned, had an interest in, or had the right to possess the *negotiable instrument*. *See Rodrigue*, 406 F.3d at 439. ANICO has not met its burden of demonstrating that it meets this requirement. Indeed, ANICO's reading of the statute to include non-payees would render the next element of the conversion claim—requiring that the plaintiff's endorsement be forged without authority—meaningless. *See id.* ("To establish that a financial institution is liable for conversion under Illinois law, the plaintiff must establish . . . that someone forged or without authority placed the plaintiff's endorsement on the instrument").

The distinction between the owner of a check and the owner of the funds backed by the check in conversion cases is rationally related to the oft-cited principle that *790 money may not be the subject of conversion unless it is capable of being described as a specific chattel. *See In re Thebus*, 91 Ill.Dec. 623, 483 N.E.2d at 1260. To the extent that ANICO was deprived of funds that rightfully belonged to it, its recourse lies against NAIU and Carter, not against Citibank for actions it took relating to checks not made out to ANICO.

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III. CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted.

ENTER:

/s/

JOAN B. GOTTSCHALL
United States District Judge

DATED: August 24, 2007

**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH
CIRCUIT DENYING PETITION FOR REHEARING
FILED OCTOBER 30, 2008**

**UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604**

October 30, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

ANN CLAIR WILLIAMS, *Circuit Judge*

No. 07-3746

AMERICAN NATIONAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

CITIBANK, N.A.,

Defendant-Appellee.

**Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.**

Appendix C

No. 02 C 3390

Joan B. Gottschall, Judge.

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing *en banc* on September 25, 2008. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

APPENDIX D — RELEVANT STATUTE

§ 3-420. Conversion of instrument.

- (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.
- (b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
- (c) A representative, other than a depositary bank, that has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.